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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED.

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SUMMARY OF ARGUMENT.

I.

Assuming solely for the sake of argument that the lease could be cancelled for any governmental purpose whatsoever, as asserted by Government, the doctrine of election of remedies forecloses the Government from contending: (1) that it cancelled the lease; and (2) that the lease was cancellable for any purpose other than for Naval Aviation activities. This is so because the Government elected to exercise its power to condemn. It could have instituted a possessory action or other appropriate action to test the meaning of the cancellation

clause in the lease and the efficacy of the cancellation notice. Instead it elected to file a condemnation suit to acquire the condemnee's leasehold interest.

The courts below properly ruled that the doctrine of election of remedies barred the Government from asserting that it had cancelled the lease. However, both the trial court and the Court of Appeals failed to extend the doctrine to its proper scope. They inquired into the issue of the interpretation of the lease. Although they construed it to mean that it could be cancelled only for Naval Aviation activities, as contended for by condemnee, the doctrine of election of remedies, properly applied, should have foreclosed any inquiry at all into the construction of the lease.

Because the Government elected not to contest the meaning of the lease in some action other than condemnation but chose to condemn the interest that lessee claimed in the leasehold estate, the Government under the doctrine of election of remedies could not contest condemnee's interpretation of the lease in the condemnation proceedings.

For this reason the lease must be considered as being cancellable only for Naval Aviation activities, and the Government is foreclosed on this appeal from contending that the lease is cancellable for any other reason.

II.

If the issue relating to the interpretation of the lease is treated as still open, despite the doctrine of election of remedies, the plain language of the lease, the circumstances surrounding its execution, and the actions of the parties demand the interpretation that the lease could

not be cancelled unless the Secretary of the Navy decided that a revocation was essential for Naval Aviation activities. Therefore the courts below properly held that the attempted revocation was ineffective because the proposed use admittedly was for Army Nike anti-aircraft purposes and not for Naval Aviation activities. The lease was in full force and effect at the time the condemnation complaint was filed and the defendant is entitled to just compensation for the then unexpired term of the lease. The Government was not as a matter of law, entitled to a "no value" verdict.

ARGUMENT.

I.

THE DOCTRINE OF ELECTION OF REMEDIES ESTOPS THE GOVERNMENT FROM LITIGATING EITHER THE ISSUE OF CANCELLATION OF THE LEASE OR THE ISSUE OF INTERPRETATION OF THE LEASE, IT HAVING ELECTED TO CONDEMN THE LEASEHOLD INTEREST INSTEAD OF RELYING UPON THE CANCELLATION THEREOF.

The opinion of the Court of Appeals in the case at bar so fully and forcefully presents authorities and reasons for applying the doctrine of election of remedies (R. 467-472) that we deem it unnecessary to burden this Court with a repetition of the cases and argument therein contained. We shall confine ourselves to a discussion of matter and authorities in Government's brief that is not covered by the opinion of the Court of Appeals.

We shall also point out that while the courts below properly held that the doctrine of election of remedies applies, they did not apply it to the full extent warranted by the unique facts in the case at bar. The doctrine should not only foreclose the issue of cancellation of the lease, but also the issue of interpretation of the lease.

The Government, for the first time, relies in this Court upon *United States* v. *Turner,* 175 F. 2d 644 (C. A. 5) as authority for filing a combination condemnation-trial of title proceeding. Insofar as the majority opinion in the *Turner* case may hold that the doctrine of election of remedies is not applicable, it is contrary to the numer-

ous decisions of state and federal courts cited by the Court of Appeals below.

The opinion of Waller, Circuit Judge, (concurring in part and dissenting in part) vigorously speaks out in favor of applying the doctrine (175 F. 2d 649):

> "The Government initially set out towards the goal of acquiring title to the lands by a condemnation suit but now has reversed the field and is trying to run with the ball in the opposite direction. Its assertion that it does not now want condemnation but confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible."

It is submitted that this reasoning, which is the basic foundation of the doctrine of election of remedies, is most persuasive. This Court should approve the dissenting opinion in the case, which clearly expresses itself on the point, and which is in harmony with the cases relied upon by the Court of Appeals below, and should disapprove the holding of the majority opinion in the *Turner* case which presents no sound reason for rejecting the doctrine. For the same reasons the position taken by the Court in *United States* v. *San Geronimo Development Co., Inc.*, 154 F. 2d 78, also relied upon by Government, should be disapproved. Even that case designates the proceedings as an "unfamiliar hybrid".

In a footnote on page 23 of its brief, the Government attempts to distinguish the *Chicago, B. & Q. R. Co.* decision, one of the cases cited with approval by the Court of Appeals below, on the grounds that the Government in that case tacitly acquiesced in appellee's claim of ownership. But in quoting from that case, the Government

left out the balance of the sentence stating that "by instituting the action (the Government) impliedly promised to pay for its value." Likewise, the Government disregards the heart of the paragraph from which it excerpted a part of a sentence; namely, "the petition [condemnation] recites, *as it must*, title and ownership or interest by the defendant, the condemnor is thereby bound by such expressed recognition of title, and cannot be heard to assert the contrary etc." (Emphasis added.) Because under Wisconsin (and Illinois) law the condemnation petition *must* allege title or possessory interest in the defendant, it is immaterial whether the Government acquiesced in appellee's claim in the *Chicago, B. & Q. R. Co.* case, and Government's attempted distinction between that case and the instant case is without merit.

In the same footnote the Government attempts to distinguish *United States v. 11.48 Acres of Land*, 212 F. 2d 853 (C.A. 5, 1954). The distinction is not valid. That case was decided on the basis of election of remedies, and for this reason the Court did not pass upon the issue of whether the United States had exceeded the scope of its navigation servitude.

The election of remedies in the case at bar was not merely an inadvertence on the part of Government. It was a deliberate act. The condemnee had filed a declaratory judgment suit to test the issue of interpretation of the lease but the Government deliberately refused to join issue on the point by filing a motion to dismiss the suit on grounds of immunity from suit. Thereupon the condemnee voluntarily dismissed the suit. (R. 31).

Thereafter the complaint in condemnation was filed. It was unequivocally framed in condemnation, "for the taking of property under power of eminent domain and

for the ascertainment and award of just compensation, if any, to the party in interest." (R. 10). It is true that the complaint recites that notice of revocation of the lease was sent, thereby injecting the implication that the Government might claim possession as of right, but the complaint does not seek a quieting of the title—solely a taking under the power of eminent domain. The order for possession entered the day the complaint was filed ordered a surrender of the property *"to the extent of the estate being condemned."* (R. 26) (Emphasis ours).

It is hard to conceive of a more appropriate situation to which the doctrine of election of remedies should be applied. Confronted with two alternatives, one putting the Government in possession only after adjudication of right to possession and the other immediate possession regardless of right, the Government chose the second alternative and now seeks all the advantage it would have had by pursuing the first alternative. The doctrine of election of remedies was expressly designed to prevent this "eat your cake and have it" result.

50 USC Sec. 171 was originally involved in the case at bar. It was superseded by 10 USC Sec. 2663 which was in effect at the time of the trial. Both statutes were substantially the same in language and required the state law to be followed in condemnation proceedings.

It is indisputably clear from the cases cited by the Court of Appeals below that under Illinois law the doctrine of election of remedies applies to condemnation proceedings. (R. 468-469) Thus, by virtue of these Federal statutes making Illinois law applicable, the doctrine applies to the case at bar.

The Government seeks to avoid the doctrine by contending that Rule 71A superseded 50 USC Sec. 171, and

that at the time the complaint was filed in 1954, when the election of remedies occurred, Rule 71A was in effect.

There is no force to the Government's position because Rule 71A does not refer to the doctrine of election of remedies, which is a matter of substantive law. As the name "Federal Rules of Civil Procedure" indicates, these rules apply only to procedure and do not purport to affect substantive rights. (Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A, 1958 Cumulative Annual Pocket Part, page 323).

Rule 71A merely states in great detail the mechanics of practice and procedure which are to be followed in condemnation—joinder of parties, the form of complaint, the process, the form of answer, amendment of pleadings, etc. To the extent that these detailed mechanics of procedure are in conflict with State procedures, Rule 71A might govern. But this is no argument that the doctrine of election of remedies is controlled by Rule 71A. This rule does not expressly or even inferentially refer to the doctrine, which does not relate to the mechanics of trying the case.

Election of remedies is a matter of substance, and the Government in the footnote on page 18 of its brief so concedes. The *effect* of filing a condemnation suit as an election of remedies is radically a different matter from the *conduct* of a condemnation suit after it has been filed.

50 USC Sec. 171 compelled application of the state law with respect to such substantive aspects as election of remedies, as well as procedural aspects. Rule 71A devoted itself to only procedural aspects and only to that extent superseded the conformity statutes. Rule 71A was not intended to, and did not supersede the substantive

aspects of a number of different condemnation statutes, including 50 USC Sec. 171 (Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A, 1958 Cumulative Annual Pocket Part, pages 323, 324). Therefore, the doctrine of election of remedies, which the Government concedes is a matter of substance and not procedure, remained intact, and is governed by state law.

Use of the enormously persuasive power of the executive branch of Government to obtain, while this case was being litigated, a retroactive repeal of the conformity provision of 10 U.S.C. 2393 (Government's brief, p. 19; 1958 U. S. Code Congressional and Administrative News, p. 6296) must be regarded as futile to affect existing rights. The die was cast in 1954 when the complaint in the instant case was filed and the property of condemnee was seized. The law as it then read worked an election of remedies. Judgment in the trial court, based on that doctrine was entered July 9, 1957. The letter from the Lands Division of the Department of Justice, referred to in the 1958 news service above cited was written in August 1957 and it was not until September 2, 1958 that the deletion of the conformity clause was enacted. This was after the opinion of the Court of Appeals below on July 15, 1958.

Whatever may be the effect of the deletion of the conformity clause upon future litigation not involving the present parties need not be debated. It seems abundantly clear that what took place in 1954 when the Government filed its complaint in this case cannot be affected by Congressional action in 1958.

Even assuming that Federal law and not state law determines the applicability of the doctrine of election

of remedies, the results would be the same. As the Court of Appeals below stated:

> "In our view, we need not be concerned with this question [whether State or Federal law applies] because the reasoning employed by both the Federal and State courts of Illinois leads to the same result." (R. 468)

In addition to *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, (CA 7, 1937), cert. den. 302 U.S. 714, and *United States* v. *11.48 acres*, 212 F 2d 853 (C.A. 5, 1954) which held that the Government was barred from contesting title of the condemnee under the doctrine of election of remedies, the Court of Appeals below relied upon numerous decisions of the Supreme Court of the United States and lower Federal Courts widely applying the doctrine in non-condemnation cases for the purpose of accomplishing justice (R. 468). One of these cases, *United States* v. *Oregon Lumber Co., et al.*, 260 U. S. 290, applied the doctrine against the Government.

The case at bar presents a vivid illustration of the imperative need of such a doctrine in condemnation proceedings if justice is to be accomplished.

When the dispute arose between the parties as to the right of Government to revoke the lease, the defendant took prompt steps to obtain a speedy adjudication of the rights of the parties. It filed suit for declaratory judgment. (R. 31). The Government refused to permit the issues to be adjudicated in that suit by interposing the plea of immunity from suit, whereupon the defendant dismissed its suit without prejudice and prior to any hearing or determination of the issues. (R. 31). In the declaratory judgment action an expeditious adjudication of the issues could have been obtained virtually on the pleadings. Instead the Government resorted to condemnation.

When the Government decided to invoke its powers of condemnation, it forced upon the Courts and the condemnee such a fastastically complicated legal situation that the Court of Appeals below had to write a twenty page opinion to dispose of the issues, during the course of which it stated:

> "Certainly the court was presented with an extraordinary situation; *in fact we doubt if there is one in the books even closely akin to it.* It would be difficult for any court to determine whether each bit of evidence introduced into *such a complicated* situation was proper." (emphasis added) (R. 476)

Now after a jury trial lasting eight days, at which thirteen witnesses testified, with two Government lawyers and two defense lawyers engaged in the trial, with 600 pages of transcript written up and a printed appendix of 459 pages being filed, the Government takes the position that all of the time and energy of the judge, jury, lawyers, court reporter, printer and the enormous cost to the public and the individual litigants are to be flushed down the drain. It was the Government who demanded a condemnation trial, not the defendant. The defendant sought a sensible and inexpensive adjudication of the issues but was unceremoniously precipitated into this protracted trial and subsequent appeals. To contend that it was a futile and meaningless contest is an imposition upon the trial and appellate courts, the jury, the taxpayers, and the defendant who found themselves burdened with complex issues instead of the simple issue that would have been involved if the declaratory judgment action had been accepted by Government as the manifestly rational vehicle to adjudicate the basic contest.

The power of eminent domain is one of the mightiest of the sovereign rights. Seizure of the property is immediate and cannot be resisted by the property owner. Immediate possession cannot be obtained in ejectment or other appropriate action to adjudicate the right to possession. Possession must await a final determination according to the orderly judicial process. It is a shocking proposal that Government advances in the case at bar: that wielding the weapon of eminent domain it can bludgeon the property owner into immediate surrender, destroy its lucrative business, force the thus financially impoverished defendant into a costly trial and then blithely shift its position to that of an ordinary landlord testing its rights under a lease.

Condemnation at best is a harsh necessity imposed upon citizens on the theory of public necessity. The rules of compensation concededly do not always make good all the losses to which the property owner is subjected. It would be the rankest of injustice to superimpose upon a basically harsh situation an additional hardship in the form of a rule that permits the Government to seize the property forthwith upon the pretext of exercising a sovereign power and having received the fruits of such exercise of power refuse to pay for the property on the ground that it was entitled to the property as a matter of right.

It is the primary function of Government to use its sovereign powers to protect its citizens—not as instruments of oppression. It is a misguided perversion of governmental power to use the shield of governmental immunity to avoid a speedy test of rights, to force the defendant into protracted contest on the battlefield of condemnation and then, after Government has been defeated upon a battlefield chosen by it, to seek to retreat to the

battlefield originally tendered by the defendant and rejected by Government.

The Government claims that if the doctrine of election of remedies is held to be applicable to condemnation, governmental land acquisition programs would be hampered. This contention comprises the principal argument advanced by Government in support of its position.

Assuming for the sake of argument the accuracy of the claim, a fair question is raised as to whether the inconvenience of the Government justifies making an exception in the field of condemnation so that the doctrine of election of remedies would apply to all other fields of law except condemnation.

As the Court of Appeals below mentions in its opinion, the essential elements of the doctrine of election of remedies are "(a) the existence of the two remedies; (b) the inconsistency between the remedies; (c) the choice of one of the remedies." (R. 468) All three elements unquestionably exist in the case at bar. Why should an exception to the doctrine be made in this case?

The Government's claim that it will be greatly inconvenienced by the application of the doctrine to condemnation smacks of the familiar cry of expediency which throughout the history of Government has been seized upon in an effort to whittle away personal and property rights of its citizens.

The actual extent to which Governmental land acquisition programs would be hampered, as claimed by Government, is unknown to us, of course, and we have no way of determining it because there is nothing in the record of this case bearing on the subject. From the paucity of Federal decisions involving the doctrine of election of

remedies in condemnation proceedings, it might seem that the number of instances would not be significant and that the Government is indulging in a self-serving argument of the kind which no private litigant can dispute factually because of lack of knowledge.

It would seem, however, that the vast bulk of condemnation cases in which title is contested pertains to disputes regarding which of several claimants are entitled to the condemnation award. (This is conceded by Government at page 22 of its brief.) As the Court of Appeals below points out in its opinion, this type of case has nothing at all to do with the issues in the case at bar (R. 469-470.); and such cases could not be affected if this Court should hold that the doctrine of election of remedies is applicable to condemnations.

Common sense compels one to believe that only isolated instances will occur, if at all, where the meaning of a Government lease is in dispute and the requirements of the Government for possession are so urgent that condemnation must be resorted to instead of a Declaratory Judgment, ejectment or other possessory action. The case at bar would appear to be unique, and the odds are great that a similar factual situation will not arise.

But even assuming that the Government can prove to the satisfaction of this Court that a decision in this case favorable to the respondent would inconvenience the Government in its future land acquisitions, the drastic hardships which would be imposed upon the condemnees if the doctrine of election of remedies did not apply to condemnation proceedings would require a holding that the doctrine did apply. Only such a holding would be consistent with the guarantees of the Constitution and with the basic

philosophy of our democracy under which the Governme is subservient to the best interests of the people.

The constitutionality of the condemnation statutes can be sustained only on the basis that just compensation is awarded to the condemnee. Where the course of action followed by the Government becomes so burdensome to the condemnee that, as a practical matter, he can scarcely afford to assert his legal right to receive just compensation in the condemnation proceeding, he is being deprived of due process of law. The policy of fair play, inherent in our system of law, likewise dictates against rules of law which seriously hamper, and in many cases may well prevent, a condemnee from prosecuting his claim.

Rules of law should be established for condemnation suits which recognize that even financially strong condemnees, when thrown against their will into a contest with the tremendously powerful resources of the Federal Government, frequently come out of the struggle financially scarred. Such rules of law should also recognize that the vast majority of condemnees will be individuals and companies, such as the respondent, of modest financial circumstances. Being suddenly deprived of their homes or their businesses, they have the choice of two unfortunate alternatives—to take what the Government offers them, or to litigate for years through the trial and appellate courts. Those who choose to litigate do so at great personal sacrifice.

Is it too much to ask that the Government consider the condemnee's hardships and that the rules of law applicable to condemnations be established at least on the basis of giving the condemnee an even chance? Why on top of all the other tremendous advantages enjoyed by Government

should the additional advantage be given it of having the doctrine of election of remedies, applicable to all other fields of law, be precluded in condemnations?

At page 11 of its brief the Government states that multiplicity of actions would impose unnecessary burdens both on the courts and the parties, that the combination condemnation-trial of title proceedings advocated by Government works no hardship on the condemnee, and that neither the Court below nor respondent has suggested any reason to require two proceedings instead of one.

This argument is far removed from the realities of life.

The probabilities are that the doctrine of election of remedies will obviate a multiplicity of actions. If the question of title is tried first, a decision in favor of Government will dispose of the matter. A decision adverse to Government will probably result in an amicable agreement on the amount of just compensation, but if there were no agreement, all that would remain would be a trial on the sole issue of compensation.

Before the condemnation trial the Court denied Government's motions to strike respondent's Answer and for summary judgment based upon the claim that the lease had been properly revoked. (R. 3, 4). This legal issue was preserved in the record and could be raised on appeal. The fact thus remains that respondent was forced into a long trial without assurance that it would be entitled to any compensation eventually unless the doctrine of election of remedies barred a contest in the Appellate Courts on the revocation and construction of the lease. Likewise, the trial court had forced upon it an exhaustive trial, which in the absence of the application of the doctrine, might on appeal become a futile waste of time.

In the face of these facts, it is difficult to understand Government's argument that two suits would impose unnecessary burdens on the Courts and the condemnee. On the contrary two suits would be sensible from their point of view in the absence of the doctrine of election of remedies applying to condemnation. Only by applying the doctrine to condemnation does it make sense for the Court to devote its time to a long trial for the purpose of ascertaining just compensation, and only by applying the doctrine to condemnation can the condemnee be protected from being forced into such a trial before he is assured irrevocably that he is entitled to receive at the very least some amount of compensation.

A traditional condemnation trial involving only a determination of the amount of just compensation is an expensive and complicated form of litigation for the condemnee requiring the employment of expert witnesses, the preparation of extensive exhibits and other evidence on the question of value. (In the case at bar, the valuation issues were so difficult that the Court of Appeals below designated this case as extraordinary, doubting whether there is another in the books even closely akin to it. (R. 476))

When the condemnee is assured of at least recovering some amount of just compensation, he is usually willing to undertake the arduous task of asserting his rights in court. But where the right of the condemnee to receive any compensation whatsoever is challenged by Government, the hazards of litigating the condemnation suit may well become overwhelming. It is entirely conceivable that some condemnees, unless protected by the doctrine of election of remedies, may permit their valid claims to go by default rather than get involved in such perilous undertakings. Thus, the Government's position, if adopted, would have

the effect of discouraging individuals from obtaining the just compensation they are guaranteed by the Constitution.

The effort of the Government to criticize the situation as a matter of form and technical pleading discloses a complete misunderstanding of the situation. There are fundamental rights involved.

When a contest over the right of possession is instituted, the person in possession cannot be ousted from possession until the rights of the parties have been adjudicated. Even the Government in a possessory action would not have the right to be put in possession until it has established that right after trial.

The Government's position as claimed owner with right of possession is far different from the Government exercising the power of eminent domain. The exercise of the latter power entitles it to immediate possession leaving only the question of amount of compensation it is to pay for the property taken. It is not merely a difference in form when the Government files an action claiming to exercise the power of eminent domain as contrasted with a pleading asserting ownership and right of possession. As the Court of Appeals below said: "In the same breath, the Government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense."

It is highly inequitable to permit the Government to reap the benefits (immediate possession) of the exercise of eminent domain and then abandon its sovereign cloak and pursue the course of an ordinary litigant claiming property as a matter of right.

The exercise of the sovereign power of eminent domain is at best harsh in its consequences because it takes property from the owner without his consent. One of the harshest incidents of the situation is virtually instantaneous surrender of possession. The harshness of the situation should not be aggravated by distorting the power of eminent domain to permit the Government to seize possession immediately *in connection with the non-sovereign claim of ownership and possession.*

Condemnee in the case at bar is not a squatter or other person with an ephemeral claim of possessory interest. It has a written lease from the Government under which it operated and maintained the Government's property for seven and one-half years prior to the condemnation.

The substantial claim of right to possession is demonstrated by the fact that two tribunals in this case have already sustained condemnee's claimed right to possession under the terms of the lease.

One of the hardships of which condemnee complains as inherent in a combination condemnation-trial of title proceeding is the sudden death penalty imposed upon the business of a condemnee who has a solid and bona fide claim to possession. The doctrine of election of remedies is his only shield against this unconscionable result for which Government argues in a perverted exercise of eminent domain.

When Government asserts that a double-aspect condemnation complaint works no hardship on condemnee, it completely ignores the tremendous advantage held by a person in actual possession of property from which he is sought to be dispossessed. This is particularly true where he is conducting a business thereon and is entitled by law

to do so until he is dispossessed by formal judgment of ouster in an appropriate proceeding.

The sudden death of a condemnee's flourishing business upon the filing of the condemnation complaint and the immediate entry of the order of possession not only wrecks the business but also does so in such a fashion as to prevent condemnee from liquidating his business assets in an orderly manner which will command highest prices. Instead, all the world knows the business must liquidate and the condemnee can sell his assets only at sacrifice prices. The condemnee is not entitled to recover these substantial losses as part of the condemnation award because just compensation covers only the fair market value of the property condemned.

If respondent's lease had been held to have been validly cancelled in an ordinary possessory action, it would have had an opportunity to liquidate its business assets in the most advantageous manner without the sacrifices inherent in forced sales. Thus, the right to possession until legally ousted by a formal judgment in a possessory or other non-condemnation action is a valuable property right of which condemnee would have been deprived unless the Courts below had held the doctrine of election of remedies precluded the Government from contesting condemnee's right to possession under the lease. In no other way can the constitutional guarantees of just compensation be enforced.

The Government argues its position with regard to the doctrine of election of remedies as if this issue were being adjudicated in a vacuum. But the doctrine is a living principle of the law created by the Common Law through the ages to prevent injustice. What this Court decides with reference to the doctrine will affect the lives of all citizens who may become so unfortunate as to have their property

condemned by the Government in a double-barreled condemnation-trial of title proceeding.

The trial court and the Court of Appeals below recognized the applicability of the doctrine to condemnation, but they failed to extend the scope of the doctrine to the extent required to accomplish complete justice.

They held that under the doctrine the Government was precluded from asserting that it had attempted to cancel the lease.

But they did not hold that the doctrine prevented the Government from contesting the respondent's construction of the lease; namely, that it could be cancelled only for Naval Aviation activities. Instead, in determining the value of the respondent's condemned leasehold interest they considered the lease and agreed with respondent's construction thereof.

It is respectfully submitted that the construction of the lease should not be an issue in this case.

Application of the doctrine would be only a half-hearted gesture towards justice if the Government were on the one hand precluded from urging that it had revoked the lease and on the other hand were permitted to argue that the lease should be construed to authorize a revocation for any government purpose whatsoever. If the Court should determine that the doctrine of election of remedies applies, then we submit, it should apply to the extent of precluding Government from contending for the construction which sanctions revocation for the grounds asserted by Government. The latter cannot elect to condemn and then take the position that it is entitled to the property by virtue of rights asserted on some other basis. *United States* v. *11.48 Acres of Land etc.*, 212 F. 2d 853 (C.A. 5, 1954).

II.

THE REVOCATION OF THE LEASE IN ORDER TO USE THE PREMISES AS AN ARMY ANTI-AIRCRAFT NIKE LAUNCHING SITE WAS NOT AUTHORIZED BECAUSE BY ITS TERMS THE LEASE COULD BE REVOKED ONLY IF THE SECRETARY OF THE NAVY DECIDED THAT SUCH REVOCATION WAS ESSENTIAL FOR NAVAL AVIATION ACTIVITIES.

In the section of its brief discussing the doctrine of election of remedies, the Government demonstrated a complete unawareness of the practical side of life.

Thus, the Government contended that no hardship would be inflicted upon the condemnee if the doctrine of election of remedies were inapplicable to the double barreled condemnation-title contesting proceedings desired by Government. In the previous portions of this brief we endeavored to illustrate how the doctrine is the only salvation for the condemnee in such proceedings and that without its protection he will suffer drastically, even to the extent in some cases of being unable to assert his lawful rights to just compensation because the perils of litigating on the basis desired by Government are so great. When the Government says there is no such hardship, respondent *knows* that the Government is wrong because the respondent was confronted with this hardship in 1954 when it finally decided to risk this litigation in defense of its rights.

In that portion of its brief pertaining to the construction of the revocation clause of the lease and the leasing statutes, the Government goes a step further in demonstrating a complete unawareness of the practical side of life—people's aspirations, motives, business problems and the extent to which they are willing to risk their time, efforts and capital in financial ventures. An awareness of these factors is pertinent to this case because the Navy was

dealing with people back in 1947 when the lease was executed, and was being represented by people. We must assume that Congress likewise knew that the leasing statutes would be worthless in authorizing a successful Naval leasing program unless they authorized contractual arrangements between the Navy and reasonable businessmen which made sense to both.

The Government discusses the terms of the lease as if it were a dead instrument. On the contrary, when it was executed back in 1947 it was a living document representing the hopes and dreams of respondent to develop through its efforts and abilities the vacant hangar and land covered by the lease into one of the largest private flying schools in the United States. (Respondent actually accomplished this during its seven and one-half years of occupancy. (R. 280)). When the lease was executed, the Navy likewise had hopes as well as dreams incorporated into this lease. It hoped that the respondent would preserve and maintain the airport and keep it in good condition during its tenancy so that it would be ready for immediate use by Naval Aviation in case the bad dreams of another war that the Navy then had came true.

When the lease and the leasing statutes are viewed in the light of actual people, all the pieces fall together into a solid, unimpeachable conclusion that the lease can be cancelled only for Naval Aviation activities, and all the contentions to the contrary made by Government in its brief assume their true proportions of unreality.

Assuming that the issue of interpretation of the lease is not foreclosed by the doctrine of election of remedies, as contended for by respondent under Point I of this brief, it is clear that the only construction possible is that

the lease was revocable by the Secretary of the Navy only under the limited circumstances of essentiality for naval aviation purposes.

There is no dispute concerning the purpose which prompted the revocation of the lease. It is conceded by the pleadings and the evidence at the trial that:

(a) The Department of the Army attempted to cancel the lease for Army and not Naval purposes and

(b) That the former Navy Airport covered by the lease was to be used by the Army for anti-aircraft Nike operations and not for any aviation purposes whatsoever.

The Nike is a rocket-powered guided missile used by the Army as an anti-aircraft weapon to shoot down planes. The Nike is launched from ground installations which can be compared to the Army's anti-aircraft gun installations of World War II. In effect, the Nike is a superior type of anti-aircraft gun powered by rockets and guided to the target by electronics. It does not carry passengers as does a plane. It does not need an airport to land and take off of as does a plane; it can be built on any land even though surrounded by obstructions which would prevent flying. Government's asserted answer to the undisputed fact that the Army attempted to cancel the defendant's lease for non-aviation purposes of the Army is that under the terms of the lease, it could be cancelled at any time during a national emergency by any branch or department of the United States Government for any governmental purpose whatsoever. Such an interpretation of the lease requires a complete rewriting of its express terms by Army mandate without the consent of the defendant lessee.

The Government relies principally upon Paragraph 14 of the Navy's lease with respondent which provides (R. 19):

> "It is understood and agreed that this lease will at all times be revocable at will by the government * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

Taking this sentence out of context of the entire lease violates fundamental principles of construction established by the Federal Courts and the Supreme Court of Illinois as well as the Supreme Courts of all the States.

These Courts have repeatedly stated that a contract must be construed as a whole and the intention of the parties collected from the entire instrument and not from detached portions, it being necessary to construe all its parts in order to determine the meaning of any particular part as well as the whole. *Buchanan* v. *Swift,* 130 F.2d 483, 485 (C.A. 7, 1942). *Nice Ballbearing Co.* v. *Lescure,* 227 F.2d 119, 120 (C.A. 7, 1955).

In construing contracts, the Court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage in arriving at the intention of the contracting parties. *Bankers Life Co.* v. *International Telephone & T. Corp.,* 239 F.2d 621, 623 (C.A. 7, 1956).

In Paragraph 14 of the lease, the key word is "essential". That it cannot be construed in a vacuum is perfectly clear from the definition of "essential" in Webster's New World Dictionary which defines the word "essential" to mean "of, or constituting, intrinsic fundamental nature of something". (underscoring added)

When the parties agreed that the lease may be revoked in the event of "A decision by the Secretary of the Navy

that such revocation is essential", it is evident that the parties contemplated that his decision regarding essentiality must relate to something.

The circumstances surrounding the execution of the lease and the terms of the balance of the lease lead to the inevitable conclusion that the parties intended by the use of the word "essential" in Paragraph 14 to relate to the Navy's need for the former Naval Airport for Naval Aviation activities; in other words, that the lease could be cancelled only for Naval Aviation activities.

At the time the lease was executed, the parties were dealing with a Naval Airport, they had in mind only a possible future need of the site for a Navy airport. As stated in the preamble of the lease, the Navy had in mind the possibility of again using the airport only for aviation activities in the case of another national emergency. The preamble to the lease unequivocally states this intention of the Navy as follows:

> "Whereas, the Government is the owner in fee simple of a certain 93.97 acre tract of land, more or less, situated in the County of Cook, State of Illinois, upon which it has developed and operated an airfield and facilities for the activities of the United States Naval Outlying Airfield, Arlington Heights, Illinois; and
>
> "Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use *in connection with Naval Aviation activities;* and
>
> "Whereas, during such period, the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses as may be necessary or incidental to this purpose; and,

"Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government." (emphasis ours) (R. 12-13).

This preamble states what the parties specifically had in mind at the time the lease was executed. They were dealing only with a Naval airport—one party to the lease was the Navy, the defendant was a corporation engaged only in aviation and was interested in leasing the property only for aviation purposes. The Navy at the same time was interested in leasing the airport only in such a manner that it would always remain an airport available for Naval Aviation during the term of the lease.

The preservation of this status is accomplished by Paragraph 12 of the lease which specifically prohibits the defendant-lessee from using the property in any way which will limit its usefulness as an airport. Paragraph 12 provides:

"The Lessee agrees that it will prevent any use of the premises and facilities herein demised to its possession, including the construction, erection, alteration or growth of any structure or other object thereon, which would be a hazard to the landing, takeoff or manuvering of aircraft at the airfield, or otherwise limit its usefulness as an airport." (R. 19).*

The granting clause of the lease leased the airport to "the Lessee, to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto." (R. 13)

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* The Nike site constructed by the Army since it took possession of the property completely obstructs the landing area and destroys the former airport for flying, as the jury saw on its visit there.

Paragraph 8 of the lease provided that "The Government at its option and discretion reserves the right to use the landing area in a manner that will not interfere with the operations of the Lessee * * *" (R. 17) This paragraph indicates the parties contemplated the possibility of joint flying operations by both Navy and respondent during the term of the lease, making it absolutely conclusive when construed with other paragraphs of the lease that respondent and Navy were thinking only of aircraft and the desire of the Navy to keep the field at all times in shape for flying, whether before or after the Navy might cancel the lease for Naval Aviation activities.

Furthermore, the uncontradicted testimony in the case is to the effect that Congress had cut the appropriations of the Navy at the end of the war and therefore, it had no funds to maintain these types of airfields during peace time operations and desired to lease them rather than declare them surplus so that they could be used again by aircraft in case of another national emergency. (R. 273, 274)

The fundamental error of the Government's brief on this point is that it attempts to vitiate the specific agreement of the parties on the theory that since the lease was with the United States, then it must necessarily follow that any agency of the United States can revoke for any governmental purpose. The parties did not agree to that. The lease specifically requires a decision by the Secretary of the Navy of necessity for Naval Aviation activities. A decision by any agency or person other than the Secretary of the Navy was not specified nor was use for any other purpose by any agency other than the Navy specified. When the parties intended to cover the Government in its broad sense and to vest it with rights and powers they

used appropriate language to that effect. For example, the lease states it is made between "The United States of America" and lessee; it recites the "Government" is the owner in fee simple; that the "Government" leases to lessee; the "Government" shall not be responsible for damages; the "Government" reserves the right to enter for inspection purposes; the "Government" shall have the right to keep certain fire fighting supplies on the premises.

The issue is not whether "Government" can revoke the lease. The genuine issue is over the definition of the conditions under which Government can cancel the lease and for what purpose. The Government raises false issues when it argues on page 34 of its brief that the lease was with the United States and not with the Navy. Paragraph 14 of the lease must be construed together with all of the rest of the lease and the inevitable conclusion is reached that the parties intended that the lease be cancelled by the Secretary of the Navy only if the airport ever again became essential for Naval Aviation. This limitation and specification of a condition precedent cannot be brushed aside.

The Navy obtained under the lease what it bargained for—an experienced airport company which faithfully protected and maintained the airport for the Navy for the seven and one-half years prior to this condemnation.

The respondent is not asking for anything for which it did not bargain and which was deliberately granted to it. It must be presumed that it would not have entered into the lease if it contained an unqualified right of cancellation. As hereinafter more fully explained, respondent's contemplated operation and investment in improvements required an assurance of tenure subject only to the calculated risk that the premises would be needed for Naval Aviation aircraft.

The limited nature of the right to cancel the lease even for Naval purposes is indicated by the fact that the parties deemed it necessary in Paragraph 5 of the lease (R. 16) to make explicit provision for a partial cancellation of the lease and a repossession of the barracks for Naval housing purposes. This was a Naval purpose but it was not a purpose within the scope of the even more limited Naval purpose that the parties had in mind as a condition of the cancellation of the entire lease; namely, aviation purposes. Under the lease the premises could not be repossessed, for example, even for Army housing purposes, in view of the specific language of Paragraph 5 of the lease. In the face of this, the contention that the lease could be cancelled for any and all governmental purposes even those having nothing to do with the Navy Department is clearly without merit.

Further evidence of the intention of the parties appears in the Modification Agreement (R. 21) under which the lessor surrendered its right under Paragraph 5 of the original lease to recapture the barracks for Naval housing. The agreement states "that the Government relinquishes its right to re-enter the barracks building" provided for in Paragraph 5 of the lease. If the plaintiff were correct in its asserted interpretation of the lease the Modification Agreement was a wholly futile and meaningless instrument because it could be nullified at any time by revocation of the entire lease should the Government decide that it needed the demised premises for any purpose whatsoever.

The Modification Agreement was executed on February 9, 1948 a little less than a year after the execution of the original lease. The reserve power of the lessor to recapture the barracks for Naval housing having been relinquished by the Modification Agreement, the lessee acquired the same assurance of tenure with respect to the

barracks as it enjoyed with respect to the balance of the demised premises. Thereupon, in the Spring of 1948, the barracks were converted by the defendant at a cost to it of approximately $30,000 into apartments for housing of the public. (R. 208). Simultaneously, the defendant spent approximately an additional $30,000 in constructing a trailer park immediately adjacent to the barracks building. (R. 210) The Navy approved this construction work prior to its commencement and the Navy thus had full knowledge in advance of the defendant's intentions to invest substantial sums. The expenditure of $60,000 by defendant for permanent improvements with knowledge in advance by the lessor is utterly incompatible with any understanding of the parties that the enterprise was subject to a sudden death sentence. It would be the height of folly to invest such a sum if the lease were revocable upon 60 days' notice by any agency of Government and for any purpose.* The calculated risk which defendant undertook that the premises would not be needed for Naval Aviation aircraft was a reasonable one as borne out by subsequent events. The Navy never did develop any need for the premises for aviation purposes. (R. 434, R. 58) They were appropriated for Army non-aviation purposes.

In the light of the authorized expenditures for permanent improvements undertaken only after modification of the lease to remove a specially reserved threat of recapture, the unqualified power of revocation which Government claims is an absurd and impossible condition and will not be presumed.

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*The defendant developed on the leased premises the largest private flight school in Illinois, and perhaps in the United States, beginning with 1947 when the lease was executed (R. 280). It would be equally foolish to invest substantial funds in planes and equipment, etc., if lease were revocable on basis contended by plaintiff.

As the Court stated in the case of *Aronson* v. *Arakelian, Inc.*, 154 F.2d 231, 233 (C.A. 7, 1946):

> "• • • a contract will not be presumed to have imposed an *absurd* or *impossible* condition on one of the parties, but *will be* interpreted as the parties *must be supposed* to have understood the conditions at the time." (Emphasis ours).

Limiting the cancellation provision of the lease to Naval Aviation purposes mentioned above is consistent not only with the express language of the entire lease and Modification Agreement but is also consistent with the ordinarily understood and long established distinction between the Navy and the Army which existed at the time the lease was executed on May 2, 1947, prior to the passage of the Unification Act.

The Government in the footnote on page 33 of its brief cites *Wilson* v. *Towers*, 55 F.2d 199 (C.A. 4, 1932) and *Kogod* v. *Stanley Co.*, 186 F.2d 763, 765 (C.A. D.C.) for the proposition that recitals in a preamble are of weight only if the operative provisions are ambiguous and the recitals clear.

The defendant has no quarrel with this statement of the law but the facts in these two cases are completely different from the case at bar. There is no inconsistency between the recitals and operative part of the lease in the case at bar. There is an incompleteness concerning the word "essential" in the operative provision and therefore resort may be had to the clearly stated recitals to identify the subject matter to which the condition of essentiality relates.

While the incompleteness of the concept "essential" standing by itself warrants resort to the recitals for

clarification, there is another rule of contract interpretation which compels the recitals to be taken into consideration. In the lease at bar, immediately following the recitals, the lease states:

> "Now, Therefore, *in consideration of the foregoing,* and of the covenants and agreements hereinafter mentioned, the Government * * * acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the lessee * * *." (Emphasis ours) (R. 13)

In *Wall* v. *Chicago Park District,* 378 Ill. 81, 37 N.E. 2d 752 (1941), the court held that such language in a contract unquestionably and unequivocally incorporated the preamble into the operative portion of the lease. In that case the court rejected the contention that recitals in the preamble of a contract had no force and held (page 91):

> "The contract of June 12, 1912, recites that in consideration of the 'premises' and the mutual agreements of the parties, and Sheperd in consideration of the performance by the commissioners of Lincoln Park, of the 'agreements and conditions herein contained,' promised to convey riparian rights. The 'premises' are, without question, the preceding recitals as to the preparation and purpose of the commissioners to construct the improvement 'in substantial compliance' with the 1895 plan. *Defendants' argument that these statements appearing in the preamble of the contract, state merely a proposal of the commissioners, and do not express a covenant by them, is without merit.* * * * *The rule applicable to the facts in the present case is, instead, that preliminary recitals of an agreement become binding obligations when so referred to in the operative portion of the instrument as to show a design they should form a part of it.* (*Trower* v. *Elder,* 77 Ill. 452.)" (Emphasis ours)

In the *Wall* case the transitional phrase was "in consideration of the premises" and the court concluded that "premises" meant the preceding recitals. In the case at bar the transitional phrase is even clearer than in the *Wall* case that the preceding recitals were intended by the parties to be binding obligations upon them. Applying this principle to the case at bar the recitals which refer to the desire of the parties to retain the demised premises on a stand-by basis for Naval Aviation purposes must be resorted to in order to determine what the intention of the parties were with respect to the use of the word "essential" in the cancellation clause of the lease.

The Government contends on page 32 of its brief that the portion of the preamble stating that the airport "be retained in a stand-by status for post-war use in connection with Naval Aviation activities" was simply a recital of the justification for the Navy keeping the property in a stand-by status by leasing it rather than declaring it surplus and disposing of it. After referring to the Surplus Property Act of 1944, the Government states "Thus, to justify leasing property not required for immediate use, instead of disposing of it, it was necessary to determine that the retention of the property for future use was essential . . ."

But this determination was not required by that Act to be made in the leases themselves. From reading that Act it is clear that the determination was an interdepartmental determination made before the Department offered the premises for lease to the public. As far as the Surplus Property Act of 1944 is concerned, there was no need to put into any part of the lease any of the statements actually contained in the preamble. Without any preamble, the lease would have fully satisfied the

Act. The only reason for the preamble was to state the intention of the parties in accordance with the common practice of attorneys generally.

The Government argues (page 33 of its brief) that there is no reason for construing differently the authority to renew (Paragraph 1 of the lease) and the authority to revoke (Paragraph 14 of the lease). There are ample reasons for a difference in construction.

There is a striking difference between the language of the lease in Paragraph 1, which provides a renewal for an additional period of five years upon the same terms and conditions and the language of Paragraph 14 relating to revocation. A renewal is permitted only if in the opinion of the Secretary of the Navy the premises are not essential for "governmental purposes only." The criterion for the renewal privilege by lessee is thus radically different from the cancellation privilege by the lessor. If the Secretary of the Navy regarded the premises as essential for "governmental purposes", then he could block the renewal of the lease. This would not create any hardship upon the lessee because the lessee had the assurance of tenure for an initial five year term. At the termination of that initial period, it understood that the demised premises might be repossessed for governmental purposes. However, if a renewal were permitted, and it in fact was, upon the same terms and conditions as original lease, then the lessee understood that it subjected itself to the same calculated risk of cancellation only in the event that the premises were needed for "Naval Aviation activities." (Second recital). It could not, as a reasonable business proposition, commit itself to another five year term, make arrangements for carrying on its various activities, make commitments to flight students, and purchase new planes and other operating equipment,

if the risk of cancellation were as broad as Government now contends.

In the light of the foregoing analysis of the entire lease, the actions of the parties thereunder and the surrounding circumstances, there can exist no doubt concerning the correctness of our interpretation. However, if there is any shred of doubt, it must be resolved against the Government on the basis of two well-established canons of construction. An instrument must be construed most strongly against its author (*Cedar Park Cemetery Association* v. *Village of Calumet Park,* 398 Ill. 324, 333; 75 N.E. 2d 874). The lease in the case at bar was drafted by Government (R. 271). Also a lease is construed most strongly against the lessor. (*Goldberg* v. *Pearl,* 306 Ill. 436, 440, 138 N.E. 141).

The Government half-heartedly injects into the case the issue that the Secretary of Navy had authority under the law to enter only into leases which are unconditionally revocable. The only authorities cited in support of this interpretation of the statute are *Todd Dry Dock & Const. Corp.* v. *Summer Iron Works,* 289 Fed. 217, Cert. den. 263 U.S. 700, and *Hingham Management Corp.* v. *United States,* 166 F. Supp. 615 (C. Cls.) Neither case is in point. The statute involved in the *Todd* case conferred blanket authority upon the President to cancel contracts for building, production or purchase of ships, which authority was without limitations or restrictions.

In the *Hingham* case the lease provided that it could be terminated "at any time . . . during any national emergency". The lease in the case at bar in its revocation clause is not similarly absolute and all-embracive. The factual situations involved in the *Hingham* case and the case at bar are as different as night and day.

The pertinent statutes have been satisfied by the revocation provision of the lease in the case at bar to the extent that the statutes provide for revocation. The supposed repugnancy to the 1916 Act as well as the 1947 statute is that the cancellation clause imposes certain pre-requisite conditions to the exercise of the right to revoke. This is not a repugnancy, because revocability upon certain stated conditions *consistent with the requirements of the department executing the lease* is still compatible with the requirement of revocability. The statutes do not speak of unconditional revocability. The Secretary of the Navy is given full discretion as to the terms and conditions. Presumably, he is fully cognizant of the needs of his branch of Government and he must necessarily balance his present and potential future need for the premises which he is about to lease with the compulsion to obtain revenue for the Government by leasing property temporarily not needed for use by his department, or to lease property to a lessee who will preserve, maintain and protect the property where the Navy has not been given any appropriation to maintain the property (as in the case at bar, R. 273), or to lease the property without revenue to some lessee who will make a use of it that is beneficial to the country. Under these circumstances, it is reasonable to read into the statutes a power in the Secretary of the Navy to attach certain conditions to his right to cancel the lease so that a lessee would be willing to enter into the lease which he otherwise might reject because the hazard of unconditional power to revoke is too harsh.

The true purpose of the revocability requirement of the statutes is explained in the Senate Committee report and joint Navy Department and War Department letter to the Speaker of the House urging the passage of the 1947

statute. (U. S. Congressional Service, 80th Congress, First Session, 1947, pp. 1592-1599.) A study of this report and letter discloses that the essential purpose of the leasing program was to preserve the temporarily unneeded property in a "stand by" condition so that in case of a national emergency *it can quickly be restored to its former use.* This is demonstrated repeatedly throughout the report and letter and the essence of the program is thus succinctly expressed in the report (p. 1592):

> "While all of these plants may not be adaptable to peacetime uses, as many as possible will be leased to responsible companies which can operate them *without making such changes as to prevent their being rapidly put back into operation in the event of emergency.*" (Emphasis ours)

It is manifest that the revocation which was contemplated was one that would be needed for and would accomplish a restoration of the *status quo* of the property as of the time of leasing. The revocation clause in the lease at bar was in complete harmony with the purpose and intent of the statute. If the necessity arose for a restoration of the demised premises to its previous use as a Naval airport the revocation clause could be exercised and the restoration accomplished. That is the precise meaning of the revocation clause as construed by respondent and as so construed it is impossible to work out any repugnancy to the letter or spirit of the statute.

The statutes merely state that the leases are to be revocable "at any time." They do *not* say that the leases are to be revocable "at any time and for any purpose." The lease in the case at bar was revocable "at any time" within the meaning of the statutes whenever the Secretary of Navy deemed it essential to do so for Naval Aviation activities.

The Government's contention that the court must read into the statutes words which are not expressed therein to the effect that the lease must be cancelled for any reason whatsoever would bind the hands of the Secretary of the Navy in many instances to the disadvantage of the Government. We must remember that these statutes represent the basic statutes authorizing the Secretary of the Navy to lease real estate and personal property. Considering the tremendous variety of such properties, ranging from easily vacated grazing land to multi-million dollar shipyards, the tremendous variety of Naval interests and contracts and functions being performed on behalf of the Navy, it must be presumed that Congress desired by these Acts to give the Secretary of the Navy broad discretionary powers to accomplish successfully his multitude of tasks. Serious repercussions to the Navy's operations unquestionably would arise if this Court were to follow the suggestions made by the Government in its brief, because the whole leasing program of stand-by property would be jeopardized.

In the absence of judicial construction of the statutes, the interpretation placed thereon by Government officials who are charged with its administration are most persuasive. The lease to the defendant was prepared by Government lawyers who were undoubtedly thoroughly familiar with the statutes in question and who were thoroughly familiar with leases prepared pursuant to the authority granted thereunder. It was the Government and not the respondent who prepared this lease (R. 271) and the cancellation clause was put in there at the insistence of Government and for its benefit. The conditions which were incorporated in the lease as a pre-requisite to the exercise of the power of cancellation were considered by the

Secretary of the Navy and the Government lawyers representing him in this matter to be in conformity with the statutes in question.

It must be presumed, since Government drew the lease, that it followed the pattern of leases which the Secretary of the Navy was executing pursuant to statutory authority. His interpretation of his powers under the law are entitled to considerable weight. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 232 F.2d 467, 471 (C.A. 3, 1955) cert. den. 252 U.S. 891, 1 L. Ed. 2d 86.

It would be a travesty on justice for the Government under such circumstances to assert that it did not have power to execute a lease containing such a clause. The prohibition of the statute would have to be so overpoweringly clear in its language as to permit not the slightest doubt concerning its meaning before any court could permit such an outrageous and unjust position to be successfully asserted by Government.

The defendant has no quarrel with the statement that the Navy and Army are part of the United States and that all leases and contracts must be made in the name of the United States and that the Navy or Army are merely acting as representatives of the United States in executing such leases or contracts. However, this fact does not in any way mean that the Navy or Army, acting as a representative of the United States, cannot enter into a lease or contract which binds the United States according to its specific terms and continues to bind it even though the jurisdiction over the contract and lease is transferred to another branch of Government by virtue of the statute cited on page 34 of Government's brief. Neither impliedly nor explicitly is there any provision in the lease

that impairs its continued force in the event of a transfer of jurisdiction over the property from one branch of Government to another. Jurisdiction over the property is manifestly transferred subject to mortgages, leases and all other liens and incumbrances unless a contrary understanding is expressed. Otherwise the door would be open through which the Government could avoid its solemn contractual obligations through the simple device of transferring jurisdiction to another branch of Government.

The issue of transfer of jurisdiction is an utterly false and irrelevant one. The genuine issue is the nature of the rights and obligations defined by lease. These survive any inter-branch transfers of jurisdiction. Under the clear language of the lease the *Government* could cancel only for Naval Aviation activities and this is true whether it is acting through the Navy, the Army, or any other representative agency.

CONCLUSION.

The Doctrine of Election of Remedies estops the Government from litigating either the issue of cancellation of the lease or the issue of interpretation of the lease, it having elected to condemn the leasehold interest instead of relying upon the alleged cancellation thereof.

The attempted revocation of the lease in order to use the premises as an Army anti-aircraft Nike launching site was not authorized because by its terms the lease could be revoked only if the Secretary of the Navy decided that such revocation was essential for Naval Aviation activities.

Under either approach, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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